IN THE HIGH COURT OF JUDICATURE AT BOMBAY

O. O. C. J.

COMPANY PETITION NO.755 OF 2006

Ravilal Nanji Dedia (HUF) ..Petitioner.
Proprietor of M/s. Nanji P. Dedia & Sons
Vs.
M/s. Himadri Foods (P) Ltd. ..Respondent.

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Mr. Pratik Sakhseria i/b Nivit Shrivastava for the Petitioner.
Mr. Mahesh Devani for the Respondent.

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CORAM: **DR. D.Y. CHANDRACHUD, J.**

19th April, 2007.

P.C. :

1. The Company Petition for winding up has been instituted on the foundation that by a cheque dated 28th April, 2005 drawn on Bharat Co-operative Bank Limited the Petitioner advanced a loan to the Respondent repayable with interest at the rate of 15% per annum. The fact that an amount of Rs.25 lacs was paid by the Petitioner by cheque to the Respondent is not in dispute nor is the fact that the amount was advanced by means of a cheque. The Petitioner addressed a letter dated 5th October, 2005 to the Respondent setting out the details of the transaction and calling for repayment. The

contents of the letter were as follows :

> "You are hereby requested to repay the loan advanced to you by us of Rs.25,00,000/- by Cheque No. 443245 dated 28-04-2005 drawn on The Bharat Co-op. Bank Ltd. Chembur Br. along with interest @ 15% p.a. till the date of repayment of loan. It is agreed between us to pay/ receive the interest on half yearly basis i.e. on 30th September and 31st March. By these understanding the interest for the period 28-04-2005 to 30-09-2005 comes to Rs.162,500/-. The rate of interest is as per the understood term agreed between us.
>
> Hereby your kind self is requested to issue us our outstanding loan advances along with interest at your earliest. If you have any query please write back to us."

There was no reply to the letter. Having received no reply from the Respondent, the Petitioner addressed a reminder on 26th October, 2005 to which again there was no reply.

2. Eventually an advocate's notice of demand came to be issued on 6th December, 2005. In a reply dated 12th December, 2005 the Respondent set up the case that the Petitioner had placed an order for the purchase of chilli powder in the amount of Rs.55 lacs for which an advance payment of Rs.25 lacs was made. According to the Respondent the order was placed jointly on the Respondent and a

sister concern by the name of Heena Spices and that while a cheque of Rs.25 lacs was issued to the Respondent, a cheque for Rs.10 lacs was issued in the name of the sister concern. The Petitioner had, according to the Respondent, failed to lift the material “inspite of repeated requests”. Upon receipt of the letter dated 12th December, 2005, the Petitioner in a letter dated 8th February, 2006, while denying the allegation that the amount of Rs.25 lacs was an advance against the purchase of chilli powder called upon the Respondent to furnish copies of any purchase order evidencing that the advance was towards a consignment of chilli powder. The Petitioner recorded that its earlier letters dated 5th and 26th October, 2005 referring to the amount by way of a loan with interest and calling for refund have not been answered. The letter of 8th February, 2006 was replied to on 18th March, 2006 and the contention of the Respondent was that an oral order for the purchase of the consignment was placed in accordance with trade practice and that consequently, no written purchase order was available.

3. The defence, therefore, to the claim is that while an amount

of Rs.25 lacs was paid over to the Respondent this represented not a loan transaction but an advance for the purchase of a consignment of chilli powder. In evaluating the correspondence, it would be a matter of significance that the letters written by the Respondent are silent in regard to (i) the date on which an alleged order for purchase was placed; (ii) the price at which the alleged goods were agreed to be supplied; (iii) the quality of the chilli powder which was to be supplied and (iv) the quantity of the goods contracted for. Apart from the aforesaid circumstance it is also material, for the purpose of a Company Petition for winding up that neither the letter dated 5th October, 2005 of the Petitioner recording the nature of the transaction nor the reminder dated 26th October, 2005 were replied to. The defence that the amount of Rs.25 lacs was an advance for the purchase of chilli powder was set up for the first time on 12th December, 2005 in response to an advocate's notice of 6th December, 2005, but even that as noted earlier is completely vague in respect of the material particulars of the alleged transaction that the Respondent has set up.

4. In the affidavit in reply that has been filed on behalf of the Respondent, the defence in paragraph 5 is that the Petitioner had placed an order for the purchase of approximately 110 Tons of chilli powder worth Rs.55 lacs. Significantly, the reference to the quantity of 110 Tons appears for the first time in the affidavit in reply and it is common ground between the learned counsel that in none of the letters of the Respondent is there any reference to the alleged quantity ordered. In the reply it has been stated that the Respondent had to purchase chillies from the market and had carried out some process thereof, but here again, the reply is completely bereft of any material particulars. There is merit in the submission urged on behalf of the Petitioner that it is prima facie inconceivable that a transaction which related to an alleged purchase of a quantity as large as 110 Tons involving an outlay of Rs. 55 lacs would have been based on an oral transaction between the parties. That apart, the absence of an immediate response to the Petitioner's letters dated 5th October, 2005 and 26th October, 2005 and the vague nature of the transaction which the Respondent sets up would lead to a reasonable inference that the defence is an afterthought and is an attempt to avoid the

payment of an outstanding debt.

5. Another significant facet of the matter which has a bearing on the defence raised is that according to the Respondent, advances of Rs.25 lacs and Rs.10 lacs were given to the Respondent and its sister concern, Heena Spices, for the purchase of chilly powder. In the affidavit in rejoinder filed on behalf of the Petitioner, it has been clarified that in the transaction with Heena Spices - (to which a reference has been made by the Respondent in the reply) an amount of Rs.10 lacs was advanced by a cheque dated 10th February, 2005 by M/s. Prime Investment, a proprietary concern of the Karta of the Petitioner. Interest was paid by Heena Spices in the amount of Rs.20,833/- by a cheque dated 31st March, 2005 drawn on Arihant Co-operative Bank Limited after deducting TDS. The amount was therefore treated as a loan and not as an advance for goods purchased. Consequently, the defence that an amount of Rs.35 lacs was advanced in two tranches of Rs.25 lacs and Rs.10 lacs respectively to the Respondent and Heena Spices towards purchase of a consignment of chilli powder is untrustworthy and a belated

attempt to avoid the repayment of an outstanding debt due and payable.

6. However, conscious as the Court is of the fact this is a company petition for winding up, it would be appropriate and proper to pass a conditional order of deposit upon which the Petitioner would have to be relegated to the remedy of filing a suit for the recovery of its dues. The amount of deposit shall lie to the credit of the suit in terms of the orders which will be passed hereinafter. Hence, the following order :

(i) The Respondent shall within a period of twelve weeks from today, deposit an amount of Rs.20 lacs with the Prothonotary and Senior Master and intimation thereof shall upon deposit be furnished to Counsel appearing for the Petitioner;

(ii) Within a period of three months from the date of intimation, the Petitioner shall be at liberty to file a suit for the recovery of its dues. The amount deposited by the Respondent shall stand credited

to the account of the suit and abide by the final decree and order that may be passed in the suit;

(iii) The amount upon deposit shall be invested by the Prothonotary and Senior Master in a Fixed Deposit of a nationalized bank to be renewed periodically thereafter subject to such orders as may be passed by an appropriate court;

(iv) In the event that the Respondent fails to deposit the aforesaid amount as directed in clause (i), the Company Petition shall stand admitted and shall be liable to be advertised. The Petitioner shall thereupon deposit an amount of Rs.10,000/- with the Prothonotary and Senior Master towards the costs of publication, within 3 weeks of the Petition standing admitted;

(v) In the event that the Petitioner fails to institute a suit within a period of three months as stipulated herein above from the date of receipt of an intimation of deposit, the Respondent would be at liberty to apply before this Court in these proceedings for the discharge of the security.